In the High Court of Judicature for Rajasthan
Jaipur Bench

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Cr. Misc. Petition No.470/1999

Sandeep Sethi *Versus* Girraj Gupta & State

Date of Order ::: 18/09/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. B.L.Gupta & Mr. Mohit Gupta) for petitioners
Mr. Arun Sharma, Public Prosecutor for State.

Instant Misc. Petition U/s 482 CrPC has been filed by petitioner assailing order dt. 30/04/1998 whereby Judicial Magistrate No.10, Jaipur City refused to take cognizance of offence U/s 138, Negotiable Instruments Act ("the Act") and rejected his complaint No.98/97 – against which he preferred Cr.Rev.Pet. No.51/98 but was dismissed by Addl. Sess. Judge NO.1, Jaipur City vide order dt.07/09/98.

Petitioner filed complaint U/s 138 of the Act alleging inter-alia that respondent no.1 issued a cheque No.760732 dt.28/09/97 drawn on Punjab National Bank MI Road Jaipur in his favour for a sum of Rs.15,000/- and cheque was presented in his Bank on 29/09/97 but was returned on 01/10/97 as unpaid with a remark of "insufficient funds"; therefore, he sent legal notice to respondent on 14/10/97 complaining of dishonour

of cheque punishable U/s 138 of the Act with a further request to make payment of cheque amount of Rs.15,000/-, which was received by one Shri Vijay Gupta on 15/10/97 and despite legal notice, respondent No.1 neglected to pay Rs.15,000/- within 15 days expired on 30/10/1997. However, the complaint was registered and his statement U/s 200 CrPC was recorded on 09/12/97 – in course whereof, Cheque (Ex.P.1) & Bank memo (Ex.P.2) besides other documents (Ex.P.3 to P.5) were got exhibited in support of his claim. After hearing arguments, learned Magistrate declined to take cognizance of offences, ibid, and rejected complaint vide order dt.30/04/98 observing that no prima facie case is made out to draw a presumption that legal notice has been served upon the drawer either through post or by any other mode; as such cause of action has not accrued in the facts & circumstances of the case – against which petitioner preferred revision petition and it was also dismissed by Court of Revision vide order dt.07/09/98.

Counsel for petitioner submits that legal notice was duly served upon Shri Vijay Gupta, which was sufficient compliance as required under law and that apart, the issue as

to whether Vijay Gupta is in any way related to respondent NO.1 is a question of fact which can only be examined in course of trial; as such learned Magistrate committed a serious manifest error in rejecting his complaint. In support, Counsel placed reliance upon decision of Apex Court in **D.Vinod Shivappa Vs. Nanda Belliappa (2006(6) SCC 456) and of this Court in 1998(1) WLC (Raj) 304)**.

No one has appeared on behalf of respondent No.1 despite service as per office report dt.29/08/2000.

I have considered contention of Counsel for petitioner and with his assistance examined material on record. It is clearly evident from order of Court of Revision that legal notice, as alleged by complainant, was sent at respondent No.1's residence – House NO.748, Mishrajji Ka Rasta Chandpole Bazar Jaipur while in complaint, address of respondent No.1 is shown as House No.265, Vasundhara Colony, Jaipur and that apart, such legal notice was received by one Shri Vijay Gupta whereas it was nowhere stated by petitioner either in his complaint or in statement recorded U/s 200, CrPC as to whether respondent was ordinarily residing at House NO.748, Mishrajji Ka

Rasta Chandpole Bazar Jaipur or whose address has changed to House No.265, Vasundhara Colony, Jaipur at the time of filing complaint; and how Vijay Gupta in any way is related to respondent No.1 and in this view of matter, upon accepting notice by Shri Vijay Gupta, how legal or deemed presumption could be drawn of notice being served upon respondent No.1 and in such circumstances, Court of revision recorded finding that no prima facie evidence has come on record and proceeding on such premise, learned Magistrate has declined to take cognizance against respondent NO.1 for offence U/s 138 of the Act.

It is true that drawer of cheque is liable for prosecution U/s 138 of the Act if he fails to make payment of cheque amount within 15 days of legal notice given by drawee and his failure to make payment whereof leads to the complaint, as provided U/s 138 of the Act. A complete mechanism has been provided of making complaint and legal requirement which the complainant has to comply with, while examining question as to whether if postal endorsement shows that notice could not have been served on account of non-availability of the addressee, still a cause of action arises for prosecution of

drawer of the cheque on the basis of deemed service of notice under cl.(c) of proviso to S.138 of the Act, and in the facts of a given case, taking into consideration as to what has been stated in complaint, can be considered to presume deemed service, Apex Court in **D.Vinod Shivappa Vs. Nanda Belliappa (supra**) has observed that each case has to be examined on its own facts and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the drawer, Court may examine, “deemed service of notice” on the basis of totalityof facts cameon record. However, Scheme of the Act has been considered in para 8 of decision ad infra:

> **“8.** Under Section 138 of the Act, where a cheque issued by the drawer in the discharge of any debt or any other liability is returned by the bank unpaid, because the amount standing to the credit of that account is insufficient to honour the cheque, the said person is deemed to have committed an offence. This is subject to proviso to Section 138 which provides that the cheque should have been presented to the bank within the period of six months from the date of which it is drawn or within the period of its

validity, whichever is earlier. The payee must also make a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque unpaid. If despite this demand, the drawer fails to make the payment within fifteen days of the receipt of the notice, a cause of action arises for prosecuting him for the offence punishable under Section 138 of the Act. Section 142 provides that the court shall take cognizance of an offence punishable under Section 138 of the Act upon receipt of a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint must be made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. However, discretion is given to the court to take cognizance of the complaint even after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period."

In view of what has been taken note of by Apex Court, it is pre-requisite condition

before initiation of prosecution about service of notice required U/s 138 of the Act which has been incorporated with an object to evade unnecessary prosecution for a honest drawer of the cheque or to give an opportunity to him to make payment within statutory period of fortnight of notice served – reason whereof is obvious that it might be possible that on account of mistake of the Bank or for fault of others, cheque may be returned despite there being sufficient funds in Bank account of the drawer; in such circumstances, drawer of the cheque if prosecuted without notice duly served, it would certainly cause great prejudice rather hardship to him.

In instant case, it was nowhere stated by petitioner either in his complaint that the accused was ordinarily residing at the address – House NO.748, Mishra Rajji Ka Rasta, Chandpole Bazar, Jaipur at which legal notice was sent by him on 14/10/97 while complaint has been filed by him within thirty days on changed address of accused respondent as House NO. 265, Vasundhara Colony, Jaipur but basic ingredient as to whether the accused respondent is ordinarily residing at the address, on which legal notice was sent by petitioner, or person who has received notice,

how he is related to him or in statement recorded U/s 200 CrPC; in such circumstances, presumption of deemed service of legal notice can not be drawn, and it was totally missing.

In the opinion of this Court, the basic ingredient of notice being served upon respondent (accused) or it can be considered of deemed service upon him, in facts of instant case being completely missing, this Court does not find any error committed by learned trial Magistrate and so also Court of Revision while passing orders impugned, which may call for interference.

Consequently, misc. petition fails and is hereby dismissed. Record be sent back forthwith to the court below.

(**Ajay Rastogi), J.**